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Marilyn N. Harvey

LIES AND THEIR PROTECTION: A COMPARISON OF THE RIGHT TO LIE ABOUT RECEIVING A MILITARY HONOR IN THE UNITED STATES AND CANADA

Marilyn N. Harvey*

* University of Miami Juris Doctor Candidate, May 2015; B.A., University of Virginia. I would like to thank my family and friends for their love and support. Professor Caroline Mala Corbin served as my advisor and her assistance, guidance, and thoughtful critiques made this article a very interesting endeavor. Finally, the staff of the University of Miami International and Comparative Law Review deserves special thanks for helping prepare this article for publication.

> "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."
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> -Cory J., writing in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336.

I. INTRODUCTION

"Why would you lie?"

"I don't know. I didn't want to get in trouble."

"Well, too late. You're grounded for lying to me. You need to tell the truth so I can trust you."

From a young age, children are taught lying is wrong. Children are told if you lie, you cannot be trusted. Children later learn that being honest is necessary if you want to have friends, and eventually discover honesty is an essential trait for success in life. Honesty is an integral component of a functioning society and enables humans to work together more efficiently. As a result, one would think society at large would not support liars.

An interesting dichotomy exists in society because while honesty is a valued personal attribute, in certain situations, society encourages lying. One instance is white lies, whether about yourself or others. White lies are harmless or trivial lies that are told to avoid hurting someone's feelings. Therefore, in some situations some lies are good lies. Societal norms encourage white lies because sometimes you should tell someone what they want to hear whether or not it is true.

In the rat race called life, humans constantly want to portray their best selves, so sometimes white lies are employed to achieve that

goal. After all, who hasn't shaved five pounds from their weight? Who hasn't told someone all of her work is done when it is not? While lying in general is frowned upon by society, it is sometimes a necessary component of friendships and personal autonomy.

This dichotomy emphasizes the interplay between society's disavowal of liars and the need to tell a little white lie every now and again. The law in the United States does not reflect society's view of lying because there is a constitutional right to lie. One specific example of a lie that is protected in the United States is lying about receiving a military decoration or medal.

In 2005, the Congress of the United States enacted the original Stolen Valor Act, which made it illegal to lie about receiving a United States' military honor.[1] The Stolen Valor Act of 2005 amended the United States Federal Criminal Code to protect military decorations and medals and prohibited individuals from "falsely representing oneself as having been awarded any decoration or medal authorized by Congress for the Armed Forces or any of the service medals or badges."[2] In *United States v. Alvarez*, the Supreme Court of the United States found the Stolen Valor Act of 2005 unconstitutional because lying is a protected form of speech, and therefore, the First Amendment to the Constitution of the United States protects lies.[3] In Canada, Section 419 of the Canadian Criminal Code criminalizes the wearing of a military honor or an imitation of one without lawful authority.[4] Section 419 is very similar to the United States' unconstitutional Stolen Valor Act of 2005; yet so far, the constitutionality of the Canadian law has not been challenged.

Due to the fact that Section 419 of the Canadian Criminal Code is almost identical to the Stolen Valor Act of 2005, Section 419 would clearly be unconstitutional in the United States. In the United States, the process for determining the constitutionality of a law that supposedly violates the First Amendment guarantee of freedom of speech is straightforward and predictable. Unlike the United States, the process for determining the constitutionality of a law in Canada that supposedly infringes upon Canada's freedom of expression guarantee is

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[1] The Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006).
[2] *Id.*
[3] United States v. Alvarez, 132 S. Ct. 2537 (2012).
[4] Criminal Code, R.S.C. 1985, c. C-46, s. 419 (1985) (Can.).

difficult because there are many steps, and the Canadian courts have the ability to determine the infringement is warranted in order to protect society.[5] As a result, the United States' approach to protecting freedom of expression should be adopted by Canada because of its consistency.

This article will focus on the overlap between the United States and Canadian laws concerning the constitutionality of wearing a military medal to deceive. Even though it is uncertain whether or not the law would be constitutional in Canada if challenged, this article argues Section 419 of the Criminal Code of Canada should be unconstitutional in order to protect freedom of expression. In contrast, Section 419 would clearly be unconstitutional in the United States due to its well-established free speech jurisprudence. Section 419 would be expressive conduct protected by the First Amendment.[6] Therefore, Section 419 would be a content-based regulation, subject to strict scrutiny, and as a result, presumptively unconstitutional.[7] This article argues both countries would ultimately find the law unconstitutional, but the United States' approach is better, and Canada should adopt the approach because of its stability and predictability.

This article proceeds as follows. Part II discusses free speech in the United States, specifically the history behind the First Amendment and the process for analyzing a free speech claim. Then, Part III details the United States Supreme Court case *United States v. Alvarez*, specifically the arguments and the reasoning behind the decision. Next, Part IV analyzes the background of the Canadian Charter and Canadian Criminal Code, Section 419 of the Canadian Criminal Code, and describes the process for analyzing a freedom of expression claim in Canada. Part V of this article compares how Canadian courts would determine the constitutionality of Section 419 with the process United States courts would employ. Part VI of the paper discusses which country, the United States or Canada, has the best approach to protecting freedom of speech and why that approach is better. Finally, Part VII provides concluding remarks about freedom of speech in the United States and Canada.

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[5] Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (UK), 1982 (Can.).
[6] Spence v. State of Washington, 418 U.S. 405, 413 (1974).
[7] *Alvarez*, 132 S. Ct. at 2544.

II. FREE SPEECH IN THE UNITED STATES

A. *History of the First Amendment and Free Speech in the United States*

The First Amendment to the Constitution of the United States reads: "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech...."[8] When the Founders of the United States wrote the Constitution and the Bill of Rights, they were influenced by the country's British past and multiple philosophers from the 17th and 18th centuries, such as Sir William Blackstone, Montesquieu, and John Locke.[9] These philosophers believed in limits to the freedom of speech, and their philosophies were reflected in the opinions of the Founding Fathers. In fact, Blackstone's belief that "every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he published what is improper, mischievous or illegal he must take the consequences of his own temerity"[10] has been credited as forming the basis of early American colonial free speech.[11] Blackstone's differentiation between prior restraints and subsequent punishment affected United States free speech jurisprudence for almost a century.[12]

American free speech jurisprudence remained relatively stable until the early twentieth century.[13] Justice Holmes and Justice Brandeis are largely credited with the expansion of free speech protection that now characterizes modern American free speech jurisprudence.[14] In

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[8] U.S. Const. amend. I.

[9] Michael Kahn, *The Origination and Early Development of Free Speech in the United States A Brief Overview*, 76-OCT FLA. B.J. 71, 71 (2002).

[10] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, bk. 4, ch. II, 150–53 (1765–1769).

[11] Kahn, *supra* note 9.

[12] *Id.*; For more information on prior restraint and subsequent punishment, see Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648 (1955), http://digitalcommons.law.yale.edu/fss_papers/2804; Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984).

[13] Kahn, *supra* note 9, at 73.

[14] *Id.*

Schenck v. United States, Justice Holmes distinguished American free speech jurisprudence from the limits placed upon it by Blackstonian philosophy with his statement that "[i]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose."[15] Justice Holmes dramatically expanded the protections guaranteed by freedom of speech in the United States, and eventually, "the Supreme Court began to consistently rule that the First Amendment was not limited to merely prohibiting prior restraints."[16] Throughout the twentieth century, the protection of free speech in the United States increased as a result of Justice Holmes and Brandeis' actions, and consequentially, has developed into the protective force that it is today.

B. Analyzing a Free Speech Claim in the United States

In the United States, the first step in the process of analyzing a free speech claim is to determine whether or not the activity at issue is speech or conduct. If it is pure conduct it is not protected, but if the conduct is expressive the First Amendment protects it.[17] In order to determine whether conduct is expressive, courts employ the test from *Spence v. State of Washington* that asks (1) Is there an intent to convey a specific message, and (2) Is there a substantial likelihood that the message would be understood by those receiving it?[18] Under the *Spence* approach, conduct is analyzed as speech if the two factors are met.[19] The Supreme Court has protected conduct that communicates, but it cannot just be "some kernel of expression;" it must be more.[20]

Once it has been determined whether the conduct is expressive, courts determine whether or not the conduct falls within a protected or unprotected category of speech.[21] If the speech belongs to

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[15] Schenck v. United States, 249 U.S. 47, 48–49 (1919).
[16] Kahn, *supra* note 9, at 74.
[17] *Spence*, 418 U.S. at 410.
[18] *Id.*
[19] *Id.*
[20] City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).
[21] For an interesting comparison of the protection the United States grants protected speech and the protection European countries grant, see Sionaigh Douglas-Scott, *The*

an unprotected category of speech, the speech can be banned entirely. Examples of unprotected categories of speech where content-based restrictions are traditionally allowed are, "advocacy intended, and likely to incite imminent lawless action … obscenity … defamation … so-called "fighting words" … child pornography … fraud … true threats … and speech presenting some grave and imminent threat the government has the power to prevent."[22] If the speech belongs in a protected category, the analysis turns to the type of regulation that is at issue.

Regulations can either be content-based or content-neutral. In deciding whether a regulation is content-based or content-neutral, courts employ the test from *United States v. O'Brien* to determine whether or not the government regulation is justified.[23] The first question of the *O'Brien* test is whether or not the regulation is content-neutral.[24] A content-neutral regulation is a restriction that is "justified without reference to the content of the regulated speech."[25] If the regulation is not content-neutral, it is content-based, subject to strict scrutiny, and presumptively unconstitutional.[26] Several other questions courts look to when employing the *O'Brien* test are: (1) Is the governmental interest unrelated to the suppression of free expression?; (2) Does it further an important or substantial governmental interest?; (3) Is the incidental restriction on First Amendment freedoms no greater than is essential to the furtherance of that interest?; and (4) Are there adequate alternate channels of communication for individuals affected by the law?[27] If the regulation passes the test, the content-neutral regulation will be constitutional.

Hatefulness of Protected Speech: A Comparison of the American and European Approaches, 7 WM. & MARY BILL RTS. J. 305 (1999).

[22] *Alvarez*, 132 S. Ct. at 2544.

[23] United States v. O'Brien, 391 U.S. 367 (1968).

[24] *Id.* at 374.

[25] Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[26] Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 600 (2004); In the United States, there are varying levels of scrutiny used in constitutional law. The three levels of scrutiny are rational basis, intermediate, and strict scrutiny. For further reading on the levels of scrutiny in United States' constitutional law, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 551–55 (4th ed. 2011).

[27] *O'Brien*, 391 U.S. at 367.

Next, courts apply the appropriate level of scrutiny to the law at issue. If the law is content-based it will be subject to thorough review. In order for a law to pass strict scrutiny, the restriction must be necessary to achieve a compelling governmental purpose.[28] This requires the government to prove the restriction is the least restrictive option and necessary to accomplish a compelling government purpose. Laws that are "narrowly tailored to further compelling governmental interests" will pass strict scrutiny.[29] If the law is content-neutral, it will be subject to intermediate scrutiny.[30] In order to pass intermediate scrutiny, a law must "serve important governmental objectives and must be substantially related to the achievement of those objectives."[31] According to *O'Brien*, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms."[32]

III. AN OVERVIEW OF *UNITED STATES V. ALVAREZ*: THE CONSTITUTIONAL RIGHT TO LIE

United States v. Alvarez arose after Xavier Alvarez spoke at his first public meeting as a board member of the Three Valley Water District Board.[33] Alvarez introduced himself by saying, "I am a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[34] It turned out that his claim was not true. In fact, he had also lied about playing hockey for the Detroit Red Wings.[35] He claimed he married a Mexican starlet and was an engineer.[36] He even stated he rescued the American ambassador during the Iranian hostage crisis and was shot at while going back for the American flag.[37] Alvarez was and is a liar. His statements to the Three Valley Water

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[28] Sherbert v. Verner, 374 U.S. 398 (1963).
[29] Grutter v. Bollinger, 509 U.S. 306, 326 (2003).
[30] *O'Brien*, 391 U.S. at 377.
[31] Craig v. Boren, 429 U.S. 190, 198 (1976).
[32] *Id.*
[33] *Alvarez*, 132 S. Ct. at 2542.
[34] *Id.*
[35] Brief for Respondent at 1, *Alvarez*, 132 S. Ct. 2537 (No. 11-210).
[36] *Id.*
[37] *Id.*

District Board resulted in Alvarez being indicted under the Stolen Valor Act of 2005, thus inciting Alvarez's case.[38]

Alvarez claimed the Stolen Valor Act violated his constitutional right to free speech and was thus invalid.[39] The United States District Court for the Central District of California rejected Alvarez's argument, but the Court of Appeals for the Ninth Circuit reversed the district court's judgment.[40] The United States Supreme Court then granted certiorari and agreed with the Court of Appeals.[41] The right to lie is now a constitutionally protected category of speech.

In *Alvarez*, the United States argued the Stolen Valor Act of 2005 was constitutional because "Section 704(b) validly prohibit[ed] a narrow category of knowingly false factual representations that undermine[d] the capacity of military awards to confer honor on their recipients and to foster morale and esprit de corps within the armed forces."[42] The government argued that false statements of fact are outside the scope of the First Amendment, and therefore, the Stolen Valor Act was constitutional. According to the government, because of the limited protection knowingly false statements are afforded, false statements of fact could be restricted as long as the government had an important interest and provided breathing space for fully protected speech.[43]

The respondent argued that the Stolen Valor Act of 2005 was a content-based regulation of speech, and therefore, was unconstitutional because it could not pass strict scrutiny.[44] Alvarez argued that the government did not have a compelling government interest in enacting the Stolen Valor Act of 2005, and that even if there were a compelling interest, the Stolen Valor Act of 2005 was not narrowly tailored.[45] He emphasized "the right to speak and write whatever one chooses … without cowering in fear of a powerful government is … an

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[38] *Alvarez*, 132 S. Ct. at 2542.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 2543.
[42] Brief for the Petitioner at 12, *Alvarez*, 132 S. Ct. 2537 (No. 11-210).
[43] *Id.* at 18.
[44] Brief for Respondent, *supra* note 35, at 7.
[45] *Id.* at 8.

essential component of the protection afforded by the First Amendment."[46]

The United States Supreme Court decided that the Stolen Valor Act of 2005 was a content-based regulation that failed strict scrutiny.[47] Justice Kennedy, writing for the plurality, stated "the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment … the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home."[48] Kennedy emphasized "[p]ermitting the government to decree this speech to be a criminal offense … would endorse government authority to compile a list of subjects about which false statements are punishable."[49] The Court noted that fraud statutes could be employed when "false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment."[50] In the end, the Court emphasized "truth needs neither handcuffs nor a badge for its vindication," and that "[t]he Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace."[51] The unconstitutionality of the Stolen Valor Act of 2005 reinforced the country's dedication to free speech.

IV. THE CANADIAN COUNTERPART: SECTION 419 OF THE CANADIAN CRIMINAL CODE

Section 419 of the Canadian Criminal Code makes it illegal for anyone who does not have lawful authority to wear "a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order."[52] If an individual violates

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[46] *Id.* at 3.
[47] *Alvarez*, 132 S. Ct. at 2543.
[48] *Id.* at 2547.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 2551.
[52] Criminal Code, *supra* note 4.

Section 419, she is guilty of an offense punishable on summary conviction.[53]

A. *History of the Canadian Charter and the Canadian Criminal Code*

Canada, a former British colony, eventually became a federation in 1867.[54] In 1867, the British Parliament passed the British North America Act of 1867 (BNA Act) that created the country of Canada.[55] After World War II, Canadians sought to become their own country by a process called patriation.[56] Patriation is a Canadian word that describes the process "of converting the BNA Act from a British law into a wholly Canadian Constitution."[57] The first step in this process was the creation of the Canadian Bill of Rights Act, which was passed in 1960.[58] Twenty-two years later, the process of patriation was completed on April 17, 1982, when the Constitution Act, 1982 was signed by Queen Elizabeth II.[59] The Canadian Charter of Rights and Freedoms is the first thirty-four sections of the Constitution Act, 1982.[60] The Canadian Charter protects the fundamental freedoms of Canadian citizens. Specifically, Section 2(b) of the Charter guarantees that every citizen has the fundamental freedoms of "thought, belief, opinion and expression, including freedom of the press and other media of communication."[61] One interesting aspect of the Canadian Charter is Section 1 of the Charter, which states fundamental freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[62] Therefore, in Canada, society's interests can limit individuals' fundamental freedoms.

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[53] *Id.*
[54] BERNARD W. FUNSTON & EUGENE MEEHAN, Q.C., CANADA'S CONSTITUTIONAL LAW IN A NUTSHELL 27 (3d ed. 2003).
[55] *Id.*
[56] ADAM DODEK, THE CANADIAN CONSTITUTION 23 (Dundurn, 2013).
[57] *Id.* at 23.
[58] Canadian Bill of Rights, S.C. 1960, c. 44. (Can.)
[59] Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).
[60] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).
[61] *Id.* at s. 2(b).
[62] *Id.* at s. 1.

In Canada, all crimes are codified in the Criminal Code of Canada that was enacted in 1892.[63] Since 1955, the Code has "ensured that all criminal offenses are defined in statutory form" because common law offenses are no longer permitted."[64] Various forms of Section 419 have been the law in Canada since 1920, and the law has not varied much in the almost one hundred years it has been in place.[65]

B. Analyzing a Freedom of Expression Claim in Canada

In Canada, there is a specific process for determining whether a law limits a freedom protected by the Charter. As described in *Irwin Toy Ltd. v. Quebec*, the process for deciding whether or not a law is constitutional in Canada is a two-part process with multiple steps included in each part.[66] The first part of the process determines whether or not the plaintiff's activity falls within conduct protected by the freedom of expression.[67] The second part then decides whether the Section 1 override saves the law that infringes upon the right that is protected.[68]

The first step of the first part of the process involves determining whether or not a constitutional right protects the plaintiff's activity.[69] If the activity is protected, the second step of the process determines whether or not the purpose or effect of the law was to restrict a protected freedom.[70] If the purpose or effect of the law was to "control attempts to convey meaning through that activity," a Section 2 right has been infringed upon, and a Section 1 analysis is necessary to determine "whether the law is inconsistent with the provisions of the Constitution."[71]

There are numerous ways to determine the purpose or effect of a law. In order to determine the purpose, the Canadian courts assess

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[63] Dennis Baker and Benjamin Janzen, *Is It Time to Overhaul the Criminal Code of Canada?* 1 (MLI Commentary) (2013).
[64] *Id.*
[65] Crankshaw's Criminal Code of Canada, CRANKSHAW-HIST 419.
[66] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 (Can.).
[67] *Id.* at 931.
[68] *Id.* at 978.
[69] *Id.* at 931.
[70] *Id.*
[71] *Id.*

the government's purpose from the standpoint of the guarantee in question and look at the intent behind the legislature that passed the law.[72] The courts are careful to consider the purpose at the time the law was passed because "purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."[73] If the court finds that the purpose of the law was to restrict expression, the guarantee of freedom of expression has been violated.[74] If the court finds the purpose of the law was not to restrict expression, the law can still violate Section 2 because of its effect.[75] If the effect of the law limits freedom of expression, the law will violate Section 2. The burden is on the plaintiff to demonstrate that the effect limits the guaranteed right by referencing the principles and values that underlie the freedom.[76]

In conclusion, the first step of the analysis requires Canadian courts to determine whether the plaintiff's activity falls within a guaranteed right, in this case, the freedom of expression.[77] Activity that does not convey or attempt to convey a meaning has no content of expression, and activity that conveys a meaning through a violent form of expression is not within the protected sphere of conduct.[78] If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government action restricted her expression.[79] The plaintiff must at a minimum "identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing."[80]

The second part of the analysis determines whether or not Section 1 of the Canadian Charter saves the infringing law from being unconstitutional.[81] Section 1 of the Charter is referred to as the "reasonable limits clause" because it can justify the government's limitation on

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[72] *Irwin Toy Ltd.*, 1 S.C.R. at 972 (Can.).
[73] *Id.*
[74] *Id.* at 973.
[75] *Id.* at 976.
[76] *Id.*
[77] *Id.* at 931.
[78] *Irwin Toy Ltd.*, 1 S.C.R. at 931 (Can.).
[79] *Id.*
[80] *Id.*
[81] *Id.*

a Charter right.[82] There are two steps to determine whether or not Section 1 justifies the Charter limit.[83] The first step is called the prescribed by law analysis, and the second step employs the justification of limits test described in *R. v. Oakes*.[84] The "prescribed by law" analysis is easy to satisfy because it only requires a law be at issue.[85] The second part of the analysis is the *Oakes* test.

The *Oakes* test has two steps. First, the objective to be served by limiting a Charter right must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[86] The standard to meet the override is very high; it has to be at least a "pressing and substantial in a free and democratic society" to be sufficiently important.[87] Second, the party invoking Section 1 must show the means chosen are proportional to the goal.[88] The three components of the proportionality requirement are: (1) the measures employed must be rationally connected to the objective; (2) the means need to impair the right in question as little as possible, so they need to be narrowly tailored; and (3) there also must be proportionality between the effects of the limiting measure and the objective.[89] The effects of the ban cannot be so severe as to outweigh the government's pressing and substantial objective in passing the law.[90] The proportionality requirement can determine the outcome of a Section 1 analysis because if "the harms of the *Charter* violations are great and the benefits are slight, the courts may strike down a law under this last stage of the Section 1 test, even though there is not an obviously less restrictive means to pursue the government's objective."[91]

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[82] Ontario Justice Education Network, *IN BRIEF: Section 1 of the Charter & the Oakes* Test, (printed by the Canadian Civil Liberties Association) http://ccla.org/wordpress/wp-content/uploads/2010/04/OJEN_Oakes.pdf.
[83] *Id.*
[84] *Id.*, R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).
[85] Ontario Justice Education Network, *supra* note 82.
[86] *Irwin Toy Ltd.*, 1 S.C.R. at 986 (Can.) (quoting R. v. Oakes at 138–39).
[87] *Id.*
[88] *Id.* at 991.
[89] *Id.*
[90] *Id.*
[91] ROBERT J. SHARPE, KATHERINE E. SWINTON, AND KENT ROACH, THE CHARTER OF RIGHTS AND FREEDOMS 69 (2nd ed., Irwin Law 2002).

An example is *Thomson Newspaper Co. Ltd. v. Canada.*[92] In *Thomson*, the Canadian Supreme Court decided that even though a law's objective of "preventing inaccurate polls influencing the last days of an election campaign" was a pressing and substantial goal, the marginal benefits of the law, which the Court claimed would rarely occur, did not outweigh the substantial harm the effects of the ban had upon the free exercise of rights. Specifically, the Canadian Supreme Court held this "because the ban interfered with press reporting of an election and deprived voters of information about the election."[93] Therefore, this final step of the balancing analysis, which most thought redundant at first, provides the Court with the discretion to apply common sense to the proceedings and further balance the harms.[94]

V. SECTION 419 IN CANADA VERSUS THE UNITED STATES

A. Canadian Law and Section 419

If Section 419 fails any portion of the Canadian analysis it is unconstitutional.[95] First, it is necessary to determine whether or not Section 2 of the Charter protects the right. According to Section 2 of the Charter, everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.[96] In this case, the right of freedom of expression is infringed upon because"if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."[97] In Canada, there are an infinite variety of forms of expression, some being "the written or spoken word, the arts, and even

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[92] Thomson Newspapers Co. Ltd. v. Canada (Attorney General), [1998] 1 S.C.R. 877 (Can.).
[93] SHARPE, *supra* note 91, at 68.
[94] *Id.*
[95] For purposes of this analysis, I am going to analyze this case as though it is before the Canadian Supreme Court.
[96] Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (UK), 1982, c 11.
[97] *Irwin Toy Ltd.*, 1 S.C.R. at 969 (Can.).

physical gestures or acts."[98] Freedom of expression is broadly defined under Section 2(b) of the Canadian Charter, and as a result, wearing a medal in order to deceive would fall under the protection of freedom of expression. Therefore, wearing a medal in order to deceive would fall under Section 2(b) of the Charter, and the right would be protected.

The next step of the analysis is to determine whether the purpose or effect of the government action was to restrict the freedom of expression. It is evident that the purpose of the Section 419 is to protect the sanctity of military honors, but the effect of Section 419 is that an individual's right to freedom of expression has been limited. After determining that a Section 2 right has been limited, it is necessary to determine whether or not Section 1 of the Charter will override the right.

In Canada, it is difficult to determine whether or not an infringement upon a Section 2(b) right will be saved by a Section 1 override. Canadian law is not clear on this issue. In the past, "The Court has held the [Section] 2(b) is to be given a broad, purposive interpretation."[99] The two-part analysis entails the prescribed by law analysis and the *Oakes* test. Depending on the protection the Supreme Court of Canada is willing to grant, the law could be constitutional or unconstitutional.

Section 419 is a part of the Criminal Code of Canada, and therefore meets the prescribed by law requirement and only needs to have an "intelligible standard."[100] Part one of the *Oakes* test requires a sufficiently important objective "relating to concerns which are pressing and substantial in a free and democratic society."[101] Historically, courts have been deferential to the legislatures regarding the importance of an objective.[102] Therefore, the Canadian Supreme Court will probably find there is a sufficiently important objective to protect the sanctity of military honors. Part two of the *Oakes* test requires determining whether the means are proportional to the ends.[103] In order to make this determination, the law must satisfy three criteria:

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[98] *Id.* at 970.
[99] R. v. Zundel, [1992] 2. S.C.R. 731, 733 (Can.).
[100] *Irwin Toy Ltd.*, 1 S.C.R. at 983.
[101] *Oakes*, 1. S.C.R. at 105 (Can.).
[102] SHARPE, *supra* note 91, at 62.
[103] *Irwin Toy Ltd.*, 1 S.C.R. at 983 (Can.).

(1) the measures employed must be rationally connected to the objective; (2) the means need to impair the right in question as little as possible, so they need to be narrowly tailored; and (3) there also must be proportionality between the effects of the limiting measure and the objective.[104]

It is relatively easy to satisfy the requirement that the measures employed be rationally connected to the objective under Canadian law. It is very similar to rational basis review in the United States.[105] In fact, the Canadian Supreme Court has "unanimously agreed that a causal relationship … could be based on common sense, reasons or logic … even though the evidence may be admittedly inconclusive."[106] Section 419 is not arbitrary and is rationally connected to the objective because Canada wants to protect military honors. Therefore, Section 419 passes part one of this test.

Part two of the test is whether the right in question is impaired as little as possible by the law. The government must prove on the balance of probabilities that the right is minimally impaired. This is not strict scrutiny. It is similar to intermediate scrutiny because there is leeway when deciding whether or not the right is minimally impaired.[107] As described in *Irwin Toy*, courts will not "take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups" and will be mindful of the function of the legislature.[108] In fact, evidence is not required.[109] The impairment must be "minimal," that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process is rarely perfect, and therefore, courts must afford some flexibility to the legislator.[110] If the law falls within a range of reasonable alternatives, "the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor

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[104] *Id.*
[105] For a discussion of rational basis scrutiny, see *supra* note 26.
[106] *Thomson Newspapers Ltd.*, 1 S.C.R. at 914 & 999 (Can.).
[107] *Supra* note 26.
[108] *Thomson Newspapers Ltd.*, 1 S.C.R. at 993 and 999 (Can.).
[109] Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569 (Can.).
[110] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 342 (Can.).

objective to infringement."[111] This is called the "least intrusive means" principle.

Part two's requirement to satisfy "the balance of the probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view."[112] In fact, all the government needs to argue is that Section 419 "falls within a range of reasonable alternatives."[113] Therefore, even if there were another way for the Canadian legislature to accomplish its goal of protecting military honors, for example with an online database like a defendant might argue, the court would not require it to do so because the method the legislature adopted may be the most reasonable way to protect the sanctity of the military honors. In fact, the dissent in *U.S. v. Alvarez* criticized the majority's claim that a database could be a viable alternative because the military only had records from 2001 onward due to a fire destroying documents prior to 2001.[114] In Canada, the situation may be similar, and therefore, Section 419 could satisfy the minimal impairment requirement of the *Oakes* test.

The third requirement of the *Oakes* test ensures there is proportionality between the effects of the limiting measure and the objective. This part of the test is becoming increasingly more important because,

> Until recently, this final balancing step has not been decisive and was thought by many to be redundant. It appeared unlikely that the Court would ever find that the objective was of sufficient importance to justify overriding a protected freedom, and that the least intrusive means had been employed, but nevertheless conclude that on balance the effects of the right were disproportionate.

ROBERT J. SHARPE, KATHERINE E. SWINTON, AND KENT ROACH, THE CHARTER OF RIGHTS AND FREEDOMS 68 (2nd ed., Irwin Law 2002). The Canadian Supreme Court will likely accept the importance of protecting the sanctity of military honors, but the benefits of this law

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[111] *Id.*
[112] *Id.* at 333.
[113] *Id.* at 342.
[114] *Alvarez*, 132 S. Ct. at 2559.

are marginal compared to the deleterious effects it has on speech. It is deleterious to speech to censor lies because: "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[115]

Another reason Section 419 would fail is, like the Stolen Valor Act of 2005, Section 419 suffers from over breadth because it applies to everything in the home, family, social, or private contexts. Section 419 would allow for a slippery slope because the legislature could criminalize a long list of activities if Section 419 were constitutional and could enact increasingly intrusive criminal laws. Even worse, Section 419 might lead to the chilling of speech because individuals would be afraid to say anything for threat of legal prosecution. In *Alvarez*, the Supreme Court of the United States emphasized, "The mere potential for the exercise of power causes a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."[116] While the harm in this situation may be a decrease in the value of military honors because of a flooding of the market, the best way to counter that is with other speech. It is important to protect the marketplace of ideas and to protect society from the chilling effect laws that regulate freedom of expression have upon individual's actions.

There is a distinct possibility though that the Canadian Supreme Court will find that Section 419 satisfies the proportionality requirement, and therefore, is constitutional. The Canadian Supreme Court might find that the risk of chilling speech is relatively low, and therefore, Section 419 may pass the proportionality part of the *Oakes* test and be found constitutional. It is also entirely possible for the Court to decide that the benefits of Section 419 are more important than an individual's free expression rights, specifically with regards to lying. In fact, in *Hill v. Church of Scientology of Toronto*, a libel case, the Canadian Supreme Court stated, false speech is "very tenuously related to the core values which underlie [Section] 2(b)."[117] The Supreme Court of Canada has also refused to protect hate speech, stating that the benefits of suppressing hate speech outweigh the

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[115] *Id.* at 2552.
[116] *Id.* at 2548.
[117] Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 1174 (Can.).

deleterious effects of hate speech because hate speech did not promote the values underlying freedom of expression.[118] Unlike the right to lie, the prohibition against hate speech involves balancing freedom of expression, equality rights, and preventing the spread of hate.[119] Lies are not targeted at one group in the same way that hate speech is, but the Canadian Supreme Court could find that lying about receiving a military honor harms military veterans and is an attack on the importance of their service.

Although there is evidence the Canadian Supreme Court may find Section 419 constitutional, I do not believe the Court will because of *R. v. Zundel*. In *Zundel*, a case involving the spreading of false news in regards to the Holocaust, the Canadian Supreme Court held that "false statements deemed likely to injure or cause mischief to any public interest" couldn't be saved under Section 1 of the *Charter* because the law was too broad.[120] Justice McLachlin stated that,

> to permit the imprisonment of people, or even the threat of imprisonment, on the ground that they have made a statement which 12 of their co-citizens deem to be false and mischievous to some undefined public interest, is to stifle a whole range of speech, some of which has long been regarded as legitimate and even beneficial to our society.

R. v. Zundel, [1992] 2 R.C.S. 731, 743 (Can.). According to the Canadian Supreme Court, the purpose of freedom of expression "is to permit free expression to the end of promoting truth, political or social participation, and self-fulfillment," even if that extends to protecting "minority beliefs which the majority regard as wrong or false."[121] Consequently, there is evidence that the Canadian Supreme Court would rule Section 1 does not save Section 419 from being unconstitutional. In conclusion, the Canadian Supreme Court will likely find Section 419 of the Canadian Criminal Code unconstitutional because the benefits of

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[118] SHARPE, *supra* note 91, at 68.
[119] Saskatchewan (Human Rights Commission) v. Whatcott, [2013] 1 S.C.R. 467, 550 (Can.).
[120] *Zundel*, 2 R.C.S. at 743 (Can.).
[121] *Id.* at 752.

suppressing an individual's freedom of expression rights pertaining to wearing of military medals to deceive do not outweigh the deleterious effects of restricting the expression.

B. United States' Law and Section 419

In the United States, Section 419 would be unconstitutional.[122] Unlike in Canada where it is difficult to determine the exact outcome of this potential case, in the United States Section 419 is clearly unconstitutional because content-based regulations are subject to strict scrutiny. First, the United States Supreme Court determines whether or not the speech at issue is speech or conduct. In this case, the activity that is at issue is conduct, and the Court will apply the test articulated in *Spence* to determine whether or not it is expressive.[123] The Court asks (1) Did the person intend to convey a message, and (2) would an audience understand the message. In the case of Section 419, the specific message conveyed by wearing a fake medal is the individual is an honorable military veteran who proudly served their country. There is a substantial likelihood that a person would understand what this military honor meant if they saw an individual wearing the medal. Since the two factors of the *Spence* test are satisfied, Section 419 is analyzed as expressive conduct.

The next step in the process is determining whether or not the expressive conduct falls within a protected category of speech. In 2012, in *Alvarez*, the Supreme Court of the United States ruled false speech, specifically; lying about receiving a military honor is a protected form of speech.[124] Therefore, Section 419 falls into a protected category and cannot be banned.

After it is determined the speech falls in a protected category, it is necessary to determine whether or not the regulation at issue is content-based or content-neutral. Section 419 is an example of a content-based law. The law very clearly seeks to regulate based on the message of this expression. In the United States, the Supreme Court

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[122] I'm assuming this does not fall into an unprotected category of speech so it cannot be banned. It is not speech that incites imminent lawless action, a true threat, obscenity, children porn, or fighting words.

[123] *Spence*, 418 U.S. at 410.

[124] *Alvarez*, 132 S. Ct. at 2547.

ruled, "content-based regulations are presumptively invalid."[125] In fact, "content-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent."[126] Therefore, Section 419 would be subject to strict scrutiny.

In order for a law to pass strict scrutiny there must be a compelling state interest with narrowly tailored means.[127] The first question is whether the government has a compelling interest in regulating the wearing of military medals to deceive. In this situation, the government does have a compelling interest to protect the sanctity of military honors because "The government is correct when it states military medals 'serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,' and also 'foste[r] morale, mission accomplishment and *esprit de corps*' among service members."[128]

The next question is whether Section 419 is narrowly tailored. Section 419 is not narrowly tailored, and as a result, would fail strict scrutiny and be unconstitutional. According to *Alvarez*, "The First Amendment required that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest."[129] Section 419 makes it illegal for anyone who does not have lawful authority to wear "a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration … or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order."[130] In *Alvarez*, the government failed to show a direct causal link between its purpose of protecting the sanctity of military honors and the restrictions of individuals' First Amendment rights.[131] There was no evidence that lies about who has received the

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[125] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[126] *Alvarez*, 132 S. Ct. at 2537.
[127] Korematsu v. United States, 323 U.S. 214, 216 (1944).
[128] *Id.* at 2548.
[129] *Id.* at 2549.
[130] *Id.*
[131] *Id.*

Medal of Honor diluted the value of the honor. The government claimed in *Alvarez* that it is "common sense that false representations have the tendency to dilute the value of military awards" and that "the lie may offend the true holders of the medal," but it did not provide any evidence.[132] The government also failed to show why counter speech would not achieve its interest and why a database of military honors could be established to protect the recipients of military honors.[133] Therefore, there were alternate means of accomplishing the same goal that are less restrictive; as a result, the law was not narrowly tailored. Just as in *Alvarez*, Section 419 would be unconstitutional because it is the Canadian version of the Stolen Valor Act.

VI. WHO HAS IT RIGHT?

The United States has the better protection for freedom of speech when compared to Canada. In the United States, there is a free flow of thoughts the country is very proud of and seeks to protect. It is easier in the United States to determine whether or not a right has been violated and the protection that violation is given, and Canada should adopt this approach. Some may argue this point means that it may be easier to know how a free speech challenge will end in the United States, whether or not correctly, but reliability is an important aspect of the law and it should be the default whenever possible.

In the United States, if the law is content-based, it is subject to strict scrutiny. Yet, in Canada, the process is much more complicated and it is difficult to ascertain how the Canadian courts will decide the case due to the number of balancing steps required. Section 419 should be unconstitutional in Canada as it is in the United States in order to protect freedom of expression. Freedom of expression is integral because "A major premise of modern adjudication is that freedom of expression is a central feature of liberal democracy … open discourse is more conducive to discovering truth than is government selection of what the public hears."[134]

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[132] *Alvarez*, 132 S. Ct. at 2551.
[133] *Id.* at 2549.
[134] Kent Greenawalt, *Free Speech in the United States and Canada*, Winter LAW & CONTEMP. PROBS., 5, 7 (1992).

It is important to protect the right to lie for several reasons. One of those is to protect the marketplace of ideas because society needs to allow the search for truth. Justice Holmes in *Abrams v. United States* described how "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[135] Even if the speech is not true, it is important to allow it to compete in the marketplace so individuals can better understand the truth and make their own informed decisions. The majority in *Alvarez* detailed how they believed "the remedy for speech that is false is speech that is true," and that "the theory of our Constitution is 'the best test of the truth is the power of the thought to get itself accepted in the competition of the market.'"[136] Alvarez's lies "were but a pathetic attempt to gain respect that eluded him,"[137] and once his lies were made public, he was "ridiculed online … his actions were reported to the press … and a fellow board member called for his resignation."[138] Not to mention, even before the Federal Bureau of Investigation (FBI) began investigating Alvarez, he "was perceived as a phony."[139] Also, the Stolen Valor Act of 2005 was so broad that it covered statements that were made in satire or in protest.[140] There has been no evidence presented that counter speech is not the best solution for fighting false statements and protecting the marketplace of ideas at the same time.

Another issue that arises if society does not protect false statements is who determines the truth. Society inherently wants individuals to make that decision, rather than the government, because the government should not be in a position to determine which speech is allowed and which is not. Therefore, if arbitrary lines are drawn about what is and what is not allowed, someone will be in the business of telling someone else their belief or statements are not true. No one should be the truth police. Section 419 limits how one can think about oneself and limits self-expression, and in the United States, there is not

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[135] Abrams v. United States, 250 U.S. 616, 630 (1919).
[136] *Alvarez*, 132 S. Ct. at 2550.
[137] *Id.* at 2542.
[138] *Id.* at 2549.
[139] *Id.*
[140] Tiffany Villager, *Expose Lies With the Truth*, FIRST AMENDMENT CENTER (last visited Apr. 19, 2014, 1:23 PM), http://www.firstamendmentcenter.org/expose-lies-with-the-truth.

a limit on self-expression in this instance. Self-expression is valuable. According to the Lockean point of view,

> under the social compact sovereignty always rests with the people, who never surrender their natural right to protest, or even revolt, when the state exceeds the limits of legitimate authority. Speech is thus a means of "people-power," through which the people may ferret out corruption and discourage tyrannical excesses.

Rodney A. Smolla, *Speech Overview*, FIRST AMENDMENT CENTER, (Apr. 19, 2014, 1:26 PM), http://www.firstamendmentcenter.org/speech-overview. Allowing the government to decide what types of speech are and are not allowed affords the government significant power. It creates a slippery slope between what they can and cannot regulate.

Banning speech also produces the chilling effect. The chilling effect is when individuals decide not to speak for fear of prosecution. In order for individuals to make informed decisions, the free flow of ideas is integral. Individuals are better able to know what society needs to govern and can help create better-balanced laws. There is a direct link between freedom of speech and a vibrant democracy.[141] In *Whitney v. California*, Justice Louis Brandeis wrote, "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[142] Being able to voice your opinion, no matter the opinion, helps democracy thrive. This does not necessarily exist in Canada with regard to Section 419.

It is also important to protect a right to lie as a means of protecting individual autonomy and self-expression because those features are central to human identity. According to Justice T. Marshall, "The First Amendment serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression."[143] After all, "Freedom of speech is the right to defiantly, robustly and irreverently speak one's mind just because it is one's

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[141] *Id.*
[142] Whitney v. California, 274 U.S. 357, 375 (1927).
[143] Procunier v. Martinez, 416 U.S. 396, 427 (1974).

mind."[144] Why should someone not be able to speak their mind if they are not materially harming anyone else?

It is also important to have as much information as possible when making a decision. Being able to speak means you have a voice regardless of the message you are trying to convey. The more you participate in a democracy, the better the democracy will be in in the aggregate. According to Justice Brandeis, the framers of the Constitution,

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Whitney v. California, 274 U.S. 357, 375 (1927). Therefore, even if lying is something society frowns upon, lies need to be protected.

The United States better protects the marketplace of ideas, democratic self-governance, individual autonomy and self expression, and reflects the opinion the government should not be trusted to decide what types of speech are allowed and not allowed. Proponents of Canada's free expression laws may argue that the laws better protect society's interest. As described in *Alvarez*, "Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication"[145] Proponents of Section 419 and the 2005 version of the Stolen Valor Act argue that lies serve no speech value and harm society because they dilute the value of military honors, yet, they provide no evidence of the harm. If an individual wants to believe they earned a medal of honor, and tell individuals (not for material gain) that they did, that will be a reflection upon the individual, not upon the honor.

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[144] Rodney A. Smolla, *Speech Overview*, FIRST AMENDMENT CENTER, (Apr. 19, 2014, 1:26 PM), http://www.firstamendmentcenter.org/speech-overview.
[145] *Alvarez*, 132 S. Ct. at 2551.

The Stolen Valor Act of 2013 is an example of a way to protect the sanctity of the medal by limiting its use if there is a monetary harm.[146] If Canada wants to protect its military honors, it should amend its law to reflect the United States' Stolen Valor Act of 2013. Currently, in the United States it is illegal for "Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both."[147] The Stolen Valor Act of 2013 resembles the Stolen Valor Act of 2005, but specifically applies to fraud and monetary gain. The current Stolen Valor Act is the happy medium between protecting the sanctity of military honors and an individual's right to free speech because "A major premise of modern adjudication is that freedom of expression is a central feature of liberal democracy … open discourse is more conducive to discovering truth than is government selection of what the public hears."[148]

VII. CONCLUSION

The United States and Canada may border one another geographically, but their approaches to protecting freedom of speech are very different. In the United States, society is very pro individual and seeks to protect the individual from the government. This contrasts with Canada's societal approach to government where society's interest as a whole is the emphasis. The tensions between the primary goals of protecting individualism versus protecting society are exemplified in the differing freedom of speech jurisprudence in the two countries.

In Canada, Section 2(b) of the Canadian Charter protects freedom of expression, yet Section 1 of the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[149] The Section 1 override creates some doubt as to

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[146] The Stolen Valor Act of 2013, 18 U.S.C. § 704 (2013).
[147] *Id.*
[148] Greenawalt, *supra* note 134.
[149] Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (UK), 1982, c 11.

how a particular issue would be handled by the Canadian Supreme Court. It is difficult to determine exactly how Canadian courts would balance the interests, and whether society has the right to take a fundamental freedom from an individual.

In contrast to Canada, the United States' approach to protecting freedom of speech is very straightforward. There are well-established legal doctrines, and a series of steps that must be followed to determine whether or not a law infringes upon an individual's freedom of speech. The reliability and consistency of the United States' approach cannot be discredited. It is well known that in the United States "one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace," and as a result, the United States' approach is the best protection for freedom of speech.

Chief Judge Koziniski's remark in the Ninth Circuit's opinion in the *United States v. Alvarez* provides an excellent conclusion,

> So what, exactly does the dissenters' utopia look like? In a word: terrifying. If false factual statements are unprotected then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrase such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."

Brief for Respondent at 6, United States v. Alvarez, 132 S. Ct. 2537 (2012). In modern society, it is necessary for false statements to be afforded constitutional protection, and Canada should begin to afford this right to its citizens.